United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1667

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Docket 74-1667

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP., Owners of the Steamship WESTERN EAGLE,

Plaintiffs-Appellees,

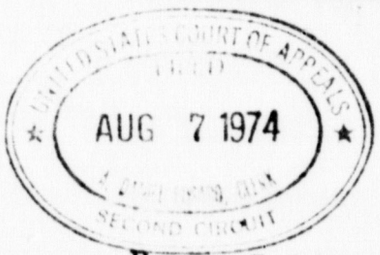
—against—

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT



HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellant
One State Street Plaza
New York, N. Y. 10004
(212) 344-6800

RICHARD G. ASHWORTH,
RICHARD L. JARASHOW,
Of Counsel.

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Appellees' brief fails to meet the thrust of appellant's points. It does not address itself to the distinction between tug assistance and towing in determining whether a warranty is to be implied into the contract, nor to whether the tugs had a duty to proceed to the normal meeting position before being ordered out by the pilot, nor to the uncontradicted evidence that the tug masters considered that the close approach of the coasters endangered the tugs, nor to appellant's point that the WESTERN EAGLE assumed the risks of proceeding.

REPLY TO POINT I

There is no implied warranty of workmanlike service in a contract to furnish tug assistance.

Appellees' brief cites (p. 3) a *towage* case in its effort to meet appellant's point that the warranty implied in a towage contract is not implied in a contract to furnish tug assistance. We do not dispute that "[t]he very nature of the towing agreement" implied a *Ryan* warranty in *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.*, 245 F.2d 84, 87 (2nd Cir., 1957), because a tow is turned over to the complete control of the tug; what we do say is that the very nature of a *tug assistance* contract negatives such a warranty, for the simple reason that the ship's navigators remain in control of the operation.

The principle here concerned is well-established in the typical timecharter situation, where charterer undertakes to provide and pay for pilots and tug assistance, but is not held to warrant their workmanlike performance, and is therefore not responsible for their fault, because navigation remains the responsibility of the vessel:

> "The fact that the charter provided that the charterer should provide and pay for pilotage and port charges did not make the pilot the agent of the charterer. His negligent acts were acts of navigation. The owners were responsible for the entire navigation of the ship." *The West Eldara,* 101 F.2d 45, 47 (2nd Cir., 1939).

So, too, in the case of a bunker's supplier which undertakes to provide and pay for tug assistance: the purpose is the payment, not assuming responsibility for navigation.

Appellees suggest (pp. 3-4) that because the tugs' expert assistance was needed (after the ship got herself into diffi-

culty), Chevron was therefore "in a far better position than the shipowner to avoid the accident," wrenching that comment completely out of its context in *Italia Societa per Azione di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323 (1964). But when an oil company undertakes to pay for tug assistance as needed, it is *not* in a position "to adopt preventive measures and thereby reduce the likelihood of injury," *id.*, p. 324: that is up to the men in charge of the navigation of the ship, under whose direction the tugs will be rendering their assistance. The present case is a far cry, we submit, from the situation where a barge owner hires a tug company to pick up its barge and tow it somewhere, as in *McWilliams*. In that case, as in the case of the *Ryan* and *Italia* stevedore, the tug company is the one in a position so to conduct the operation as to minimize the risk of accidents; in the present case the tugs were, by definition, only "assisting."

In this Court's recent opinion in *Nye* v. *A/S D/S Svendborg*, —— F.2d —— (2d Cir., July 17, 1974), decided after the submission of appellant's main brief, a warranty of workmanlike service was not implied in a service contract pursuant to which a pump manufacturer's agent dispatched an overweight engineer (Nye) to make onboard repairs. The vessel was held liable to the engineer's family for his death while boarding and sought indemnity from his employer (Marine Engine) for breach of an implied warranty of workmanlike service in the service contract. Reversing the District Court in part, this Court stated, in language singularly apposite to the present case:

> "The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case. It was the ship's duty to take all steps necessary under the circum-

stances to get Nye on board safely. Marine Engine at this juncture played no role in the forthcoming tragedy. *Situated in Hoboken, New Jersey, thousands of miles away, it had no control over the operation.*" [Emphasis supplied.]

REPLY TO POINT II(1)

There was no evidence, and the Trial Court did not find, that the tugs were under any duty to proceed to the normal meeting place before being ordered out by the pilot.

Appellees create (pp. 4-5) a straw man of the tugs' "failure" to meet the WESTERN EAGLE at the customary place. Contrary to appellees' assertion (p. 4) we have not disputed the finding (App. 305a) that the normal practice was for tugs to meet ships west of Buitenhaven. In this case, however, this was not done because, as the Court found (App. 300a), the pilot did not get aboard and order the tugs until the WESTERN EAGLE had gone past the customary meeting point and was opposite Buitenhaven.

What appellees completely ignore is the finding (App. 300a) that one of the reasons the tugs had not yet left Buitenhaven was "because the sea pilot had not ordered them to do so." This is the whole point of this aspect of the case, and appellees do not even mention it. Indeed, they misstate (p. 4) the tug captain's explanation for not coming out by omitting that half of the Trial Court's finding. The statement given by the pilot fully supports the Court's finding:

"... the vessel's assisting tugs had not proceeded out from the Buitenhaven *because they had not been ordered.* The practice here was that the Pilot who brings

> the ship into the harbour nominates the number of tugs he advises to use, and the Belgian Pilot bringing the vessel only to Flushing roads had according to this left this question to me. Accordingly therefore by the time I got on board it was too late for the tugs to make fast off the Buitenhaven.
>
> * * * * *
>
> ". . . I had to wait for the tugs *because they had not been ordered until I boarded the ship.*" (App. 145a-146a, 148a, emphasis added.)

The testimony of the expert pilot, Tjeerd, is in full accord:

> "Q. In your experience, who orders the tugs, whose authority is it to order the tugs at Flushing? Is it the pilot or is [it] the master? A. The pilot will advise the master to make use of a certain number of tugs and the master will give permission to the pilot to order the tugs." (App. 117a.)

So, too, tug captain Schuiling:

> "Q. Well how do you know when to leave the dock? A. First we know when we are told from the office. And second we wait for orders, till the pilot is [sic] called us." (App. 236a.)

There is no evidence in the record that Buitenhaven tugs *ever* proceed to the customary meeting point before being ordered out by a pilot. Appellees are in error (p. 5) in referring to a "finding with respect to the failure of the tugs to be on station waiting for the WESTERN EAGLE"; *there was no such finding by the Trial Court.* Appellees' reiterated (pp. 4-5) "failure"—connoting failure to fulfill a duty—is made up out of whole cloth.

REPLY TO POINT II(2)

The tugs' inability to assist the WESTERN EAGLE was caused by reasonable apprehension of collision.

It is all very well to note, as appellees do (p. 5) that there was room in the river for the coasters to pass; the fact is, however, that they did not pass at a safe distance but appeared out of the fog some 40 meters away (App. 271a), and the tugs had to move fast to escape being caught between the coasters and the WESTERN EAGLE. The sequence of events was as follows: the captain of the bow tug, the FREDERICK HENDRICK,

> ". . . noticed that the Western Eagle had sternway, he* gave also astern with his engine but as the Frederick Hendrick has a left-handed propeller, the bow moved to port, or swung to port, and he could not keep in contact with the bow of the Western Eagle.
>
> Q. What was his next maneuver after he realized that his stern was swinging to starboard and his bow to port? A. At that moment he saw a coaster coming down and he gave full ahead and hard to starboard, to, and came on the starboard side on the Western Eagle.
>
> * * * * *
>
> . . . his first duty was to get himself into safety, when he saw that coaster." (Bout, App. 287a-288a.)

Then, as the pilot stated in his report:

> "The coaster passed port to port. Within a few minutes another vessel heading down-river approached on

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* The interpreter's "answers" were in the third person.

> the starboard bow. I again decided to stop while this vessel passed, but the forward tug—which was about to make fast—moved away from the vessel. The other vessel, instead of passing down the starboard side, passed down the port side and went clear." (Ex. 8, App. 146a-147a.)

When the captain of the stern tug, the SOPHIA, "saw two ships coming down, he took for safety's sake up a position amidships of the Western Eagle." (Schuiling, App. 251a.) The second coaster passed so close that the captain of the SOPHIA, "was amazed that the coaster managed to get around the WESTERN EAGLE's stern" at a distance of "a few meters" (Schuiling, App. 216a, 217a-218a).

The vessel's log noted: "To avoid collision with two other vessels seaward bound we were obliged to perform full astern and whistled three short blasts." (Ex. I; see App. 113a); the pilot admitted that he was "concerned about a collision" (App. 63a). Small wonder then, as the Trial Court found, that "[a]pparently, the tugs feared a collision with the coasters" (App. 306a).

In the face of the above-quoted uncontradicted testimony appellees argue (p. 5), without citation of evidence, that "[t]here was no emergency nor risky alternative confr nting the tugs" and that the tugs did not have to maneuver to avoid collision with the coasters. The Trial Court did not say that. The pilot did not say that. When listing what he considered to be the causes of the grounding (Ex. A, App. 148a), the pilot did not even mention the tugs' inability to take lines from the WESTERN EAGLE. Nowhere in his reports or testimony does the pilot—nor does any other witness—criticize the tugs for moving away on the approach of the coasters.

To paraphrase a recent decision in *Compagnie Gen. Transatlantique* v. *Venhorst,* 1974 A.M.C. 261, 264 (SDNY, not officially reported):

> "The decision to cast off from the ship in the face of what the tug's mate regarded as imminent peril to the tug and the life of the crew, on seeing the [coasters] looming directly ahead out of the fog, was a matter of judgment made under stress. * * * He obeyed the pilot until he thought the tug and its crew imperiled * * *. To the tug's mate, the situation seemed to require him to concentrate on saving the tug and its crew, and to require the [tug's] mate to ignore what he conceived under the stress of the moment to be imminent peril to the tug and its crew is to demand an unreasonable standard of care in reckless disregard of self."

To paraphrase again, Judge Friendly, sitting by designation in the Court below, put it aptly in *Farrell Lines, Inc.* v. *S.S. Birkenstein,* 207 F. Supp. 500, 509 (SDNY, 1962):

> ". . . one must steel one's self against the temptation to substitute hindsight 'in the peace of a quiet chamber,' [citation] for the prospect facing a tug captain in [the River Scheldt] on a foggy winter [night]."

Appellees, who after all have a plaintiff's burden of proof, point to not one bit of evidence in support of the assertion that the tugs were in no danger. The evidence is, we submit, overwhelming that it was solely because of the danger of collision, for which they were in no way responsible, that the tugs were unable to assist the WESTERN EAGLE.

REPLY TO POINT III

The WESTERN EAGLE's navigators were responsible for her predicament.

Here, again (p. 6), appellees have set up a straw man: we have not attacked the Trial Court's finding of fact (App. 309a) that the fog was not dense enough to require the WESTERN EAGLE to anchor. What we have urged is that on the facts found by the Court below, this Court should hold as a matter of law that the WESTERN EAGLE's navigators were foolhardy and assumed the risk of precisely what occurred: that the tugs might not be able to make fast in time to prevent the vessel being stranded on the lee shore by the wind and current.

> "Whether the facts constitute negligence is not subject to the clearly erroneous rule and this court reviews the trial court's decision on that issue as a question of law." *Esso Standard Oil, S.A.* v. *S.S. Gasbras Sul,* 387 F.2d 573, 579-580 (2nd Cir., 1967, cert. den. 391 U.S. 914).

Another parallel can be drawn to *Compagnie Gen. Transatlantique* v. *Venhorst, supra,* in the conclusion there reached that because the dangerous situation was brought about by the ship's "decision to proceed," the tug should not be blamed for its *in extremis* decision to abandon the ship to avoid collision:

> "It would be particularly unfair in this instance to fault the action of the tug's mate since it was the imprudence of the master of the ship which caused the tug and ship to be faced with the critical situation in which

> the vessels and crew found themselves at the time of the accident in question." (1974 A.M.C. at 265.)

Even if there were a breach of the warranty in the present case, the deliberate risk of proceeding beyond the point of no return without tugs would subject the vessel interests to half damages, as was held in *Ore Carriers of Liberia* v. *Nagiven Co.*, 332 F. Supp. 72, 74 (SDNY, 1969):

> "The master and the pilot represent the owner. They knew of the danger of going up the river without tug assistance. This does not exclude the possibility that the maneuver could be successful without tugs, but that is not the issue here. [citation] They would not proceed without such assistance. Therefore, it appears that with their knowledge concerning the availability of tugs before they reached the breakwater, they should not have proceeded into the harbor."

In *Ore Carriers* damages were divided because the charterer had breached its safe-port warranty that tugs would be available to assist the ship (they were on strike when the vessel arrived). In the present case, of course, tugs were available, and it is our position that defendant made no warranty as to the tugs' performance and (or alternatively) that the tugs' peformance was in fact workmanlike.

Appellees' brief does not controvert this crucial issue of the effect of the WESTERN EAGLE's assumption of the risk of proceeding. The point here is not, as stated in the finding quoted by appellees (p. 6), whether the vessel prevented the tugs from performing (App. 311a), but the underlying point that the dangerous situation, brought about by the vessel's earlier decision to risk the adverse conditions, was

the cause of the accident. For even though we agree with the Court that after the tugs arrived on the scene there was no fault in the vessel's navigation which interfered with the tugs' performance, nevertheless the perilous situation which the ship's navigators were responsible for bringing about did, in fact, hinder and prevent the tugs from rendering assistance. As a matter of law the ship herself must be held responsible for the resulting casualty.

Dated: New York, N. Y., August 6, 1974

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellant
One State Street Plaza
New York, N. Y. 10004
(212) 344-6800

RICHARD G. ASHWORTH,
RICHARD L. JARASHOW,
Of Counsel.

Service of these (3) copies of the within Petition
is admitted this 7th day of Dec. 1977

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